ZAKIAH ISHAK

v.

MAJLIS DAERAH HULU SELANGOR

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL AZIZ MOHAMAD JCA
ARIFIN ZAKARIA JCA
[CIVIL APPEAL NO: B-02-88-2000]
25 JULY 2005

CONTRACT: *Employment contract - Termination - Whether a 'dismissal' under guise of 'termination' - Whether giving 24-hour notice and one month's salary within contractual right of employer - Whether employee must be afforded opportunity of being heard - Whether motive for termination relevant - Whether allegations of misconduct turned termination into a dismissal - Whether employee had legitimate expectation of serving out contract - Whether notice short*

The plaintiff was employed as the defendant's treasurer on a one-year contract commencing 16 July 1997. On 12 September 1997, the defendant sought to terminate the plaintiff's contract of employment by giving her a three-month notice under cl. 9 of the said contract. However, on 2 October 1997 (during the pendency of the three-month notice-period) the defendant, following a disciplinary board meeting, purported to terminate the plaintiff's services again by giving her a 24-hour notice and one month's salary. Aggrieved, the plaintiff commenced an action in the High Court claiming: (i) a declaration that the termination of her services or dismissal was null and void and that she was still in the employ of the defendant; (ii) arrears of salary; and (iii) damages. The learned judge dismissed the claim and the plaintiff appealed.

Held (dismissing the appeal)
Per Arifin Zakaria JCA delivering the judgment of the Court of Appeal:

[1] The terms and conditions of the plaintiff's employment were contained in the letter of offer which clearly stated that her employment was on a contractual basis for the period of one year. Clause 9 of the formal contract of employment also made it clear that the defendant had the right to terminate the plaintiff's services upon giving her a three-month notice in writing or one month's salary *in lieu* of such notice. The learned judge thus was right in holding that the termination of the plaintiff's contract of employment was in accord with the defendant's rights under cl. 9 thereof.

The motive or reason for the termination was strictly a matter for the defendant as the employer. The plaintiff's contract of employment was terminated; she was not dismissed. There was, therefore, no necessity to afford her an opportunity of being heard. This was not the case of a dismissal under the guise of a termination. (*Gnanasundram v. Public Services Commission* [1966] 1 LNS 219 and *Quek Chek Yen v. Majlis Daerah Kulai* [1986] 1 LNS 37 followed.) (p 81 e-h)

[2] The fact that there were allegations of misconduct (indiscipline and/or insubordination) made against the plaintiff did not preclude the defendant from terminating the plaintiff's contract of employment. (*Government of Malaysia v. Lionel* [1973] 1 LNS 37 followed.) (p 84 d-f)

[3] In the circumstances of the case, the plaintiff also did not have a legitimate expectation that she could continue in her employment for the whole of the contract period. (p 84 g)

[4] The 24-hour notice given by the defendant to the plaintiff was not in breach of the contract of employment because the defendant was well within its contractual right to give the plaintiff a one-month salary *in lieu* of a three-month notice, which it did. (pp 84 h & 85 a)

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif diambil bekerja sebagai bendahari defendan berdasarkan kontrak untuk tempoh setahun bermula 16 Julai 1997. Pada 12 September 1997, defendan telah menamatkan perkhidmatan plaintif dengan memberi tiga bulan notis menurut perenggan 9 kontrak berkenaan. Bagaimanapun, pada 2 Oktober 1997 (semasa masih dalam tempoh tiga bulan notis), ekoran suatu mesyuarat lembaga disiplin, defendan sekali lagi menamatkan perkhidmatan plaintif dengan memberinya notis 24 jam dan sebulan gaji. Terkilan, plaintif memulakan tindakan di Mahkamah Tinggi menuntut: (i) perisytiharan bahawa penamatan perkhidmatan atau pembuangan kerjanya adalah batal dan tak sah dan bahawa beliau masih lagi seorang pengkhidmat defendan; (ii) tunggakan gaji; dan (iii) gantirugi. Yang arif hakim menolak tuntutan dan plaintif merayu.

Diputuskan (menolak rayuan)
Oleh Arifin Zakaria HMR menyampaikan penghakiman Mahkamah Rayuan:

[1] Terma dan syarat-syarat perkhidmatan plaintif terkandung di dalam surat tawaran yang menyatakan dengan jelas bahawa perkhidmatannya adalah atas dasar kontrak bagi tempoh satu tahun. Perenggan 9 pada kontrak formal perkhidmatan juga menyebut dengan jelas bahawa defendan berhak

untuk menamatkan perkhidmatan plaintif dengan memberi tiga bulan notis secara bertulis atau satu bulan gaji sebagai ganti notis. Yang arif hakim dengan itu betul apabila memutuskan bahawa penamatan kontrak perkhidmatan plaintif adalah selaras dengan hak defendan seperti yang termaktub dalam perenggan 9. Tentang soal motif atau alasan penamatan, ia adalah terpulang kepada defendan sebagai majikan. Kontrak pekerjaan plaintif telah ditamatkan; beliau tidak dibuang kerja. Oleh yang demikian, soal memberikannya hak untuk didengar tidak berbangkit. Ini bukanlah kes pembuangan kerja yang berlindung di sebalik penamatan kerja. (*Gnanasundram v. Public Services Commission* [1966] 1 LNS 219 dan *Quek Chek Yen v. Majlis Daerah Kulai* [1986] 1 LNS 37 diikuti.)

[2] Fakta bahawa wujud dakwaan salah laku (tidak berdisiplin dan/atau melawan ketua) yang dibuat terhadap plaintif tidak menghalang defendan dari menamatkan kontrak perkhidmatan plaintif. (*Government of Malaysia v. Lionel* [1973] 1 LNS 37 diikuti).

[3] Dalam halkeadaan kes, plaintif juga tidak mempunyai sebarang jangkaan sah bahawa beliau boleh terus menyambung perkhidmatannya bagi keseluruhan tempoh kontrak.

[4] Notis 24 jam yang diberikan defendan kepada plaintif tidak melanggar kontrak perkhidmatan disebabkan menjadi hak kontraktual defendan untuk memberikan plaintif sebulan gaji sebagai ganti tiga bulan notis sepertimana yang mereka buat di sini.*]*

Case(s) referred to:

Calister Lionel v. The Government of Malaysia [1983] 1 CLJ 99; [1983] CLJ (Rep) 479 ***(foll)***

Gnanasundram v. Public Services Commission [1966] 1 LNS 219 ***(foll)***

Government of Malaysia v. Lionel [1973] 1 LNS 37 ***(refd)***

Lionel v. Government of Malaysia [1971] 1 LNS 67 ***(refd)***

Quek Chek Yen v. Majlis Daerah Kulai [1986] 1 LNS 103 ***(foll)***

[Appeal from High Court, Shah Alam; Civil Suit No: MT1-22-719-98]

For the appellant - Zainur Zakaria; M/s Zainur Zakaria & Co
For the respondent - Hazman Ahmad; M/s Hazman & Assoc

Reported by Gan Peng Chiang

JUDGMENT

Arifin Zakaria JCA:

Sometime in 1997 the appellant was offered employment as the Bendahari (Treasurer) of the respondent for a term of one year. She accepted the offer and commenced work on 16 July 1997. In the purported exercise of its contractual right the respondent sought to terminate the appellant's employment pursuant to cl. 9 of the contract giving the appellant three months notice with effect from 12 September 1997. However, before the expiry of the said period, on 2 October 1997, following the meeting of its Disciplinary Board, the respondent terminated the appellant's employment by giving her 24 hours notice with one month's salary. The appellant was dissatisfied with the said termination and commenced this action against the respondent asking, *inter alia*, for the following reliefs:

(a) a declaration that the said termination is null and void and the appellant is still in the employment of the respondent;

(b) arrears of salary; and

(c) damages.

The learned High Court Judge dismissed the claim with costs and hence this appeal. We heard this appeal on 20 September 2004 and dismissed the same with costs and ordered that the deposit be paid to the respondent in full satisfaction of costs. We now give our reasons for the said decision.

The learned High Court Judge in his brief grounds of judgment summarised his reasons as follows:

> Saya berpendapat bahawa pekerjaan Plaintif dengan Defendan adalah pada asas kontrak. Walaupun ada rujukan kepada Lembaga Tatatertib dalam notis kedua, ianya adalah mengenai penamatan kerja dan bukan buang kerja. Oleh itu Plaintif tidak perlu diberi peluang untuk membela diri atas apa-apa masalah yang dikatakan ditimbul oleh Plaintif itu. Dengan itu, saya berpuashati bahawa penamatan kerja Plaintif telah dibuat mengikut Klausa 9 Perjanjian itu.

In the memorandum of appeal the appellant alleged that the dismissal of the claim by the learned judge was contrary to the evidence and facts before him. That was the only ground advanced in this appeal.

The respondent here is a Local Authority established under the Local Government Act 1976. It is a body corporate having power to make appointment to such office as may be approved by the State Authority. The terms and conditions of service are to be determined by the respondent subject to the proviso that no officer or employee shall be reduced in rank or dismissed without being given a reasonable opportunity of being heard.

Before us the learned counsel for the appellant contended that based on the evidence presented the appellant was in fact dismissed on the ground of alleged indiscipline or insubordination. The dismissal, he contended, was cloaked under the guise of termination. He based his contention on the evidence of SD1 who stated, *inter alia*, that:

> Notis-notis itu dikeluarkan mengikut Klausa 9. Notis pertama bercadang memberi 3 bulan notis. Selepas itu didapati Plaintif menimbulkan masalah kepada Defendan, maka notis yang kedua ini dikeluarkan. Dalam notis kedua ini ada disebut notis pertama terbatal. Tidak perlu disebutkan rujukan kepada Lembaga Tatatertib dalam notis kedua. Tujuan rujukan kepada Lembaga Tatatertib ialah sebagai "endorsement" untuk menamatkan kontrak Plaintif.

He also relied on the report entitled "Kertas Laporan Mengenai Tatakelakuan Cik Zakiah bt Ishak – Bendahari, Gred W3 Majlis Daerah Hulu Selangor" at p. 53 of Appeal Record (AR). On the above he contended the termination was in truth a dismissal tainted with bad faith in total disregard of natural justice. On that premise he submitted the termination was wrongful.

The short answer to this can be found in the terms and conditions of her employment. These are contained in the letter of offer dated 8 July 1997 which states clearly that the employment is on contract basis for a period of one year. Paragraph 3 of the letter also states that if the appellant agreed to accept the offer the appellant is required to execute a contract with the respondent on the day she reported for duty. This contract is found at pp. 41-48 of AR. Clause 9 of which reads:

> 9. MAJLIS boleh pada bila-bila masa memberhentikan perkhidmatan PEGAWAI dengan memberi 3 bulan notis secara bertulis seperti diperuntukkan dalam Jadual kepada Perjanjian ini atau dengan memberi kepadanya satu bulan gaji sebagai ganti notis itu.

Clause 10 confers similar right to the appellant. The learned judge held that the termination here was in accord with the right conferred on the respondent by cl. 9 of the contract. From the facts presented, it is clear that the appellant was offered the post on a one year contract subject to the right of either party to terminate the same by giving the other the requisite notice or *in lieu* thereof one month's salary. The appellant accepted the offer on those terms. She cannot now complain. The premise upon which the respondent decided to terminate her contract is strictly a matter for the respondent. It is not open to the appellant to question the motive of the respondent. In this case it is clear that the appellant's service with the respondent was terminated; she was not dismissed as contended by learned counsel for the appellant. Therefore, she need not be given a right of hearing to exculpate herself.

The facts in the present case are no different from those in the case of *Gnanasundram v. Public Services Commission* [1966] 1 LNS 219. In that case the applicant was offered temporary employment by the respondent on the following conditions:

> 2. This is offer is subject to the following conditions:
>
> (d) That during the first year of the period of your appointment, your services would be terminable at any time with one month's notice or one month's salary plus cost of living allowance *in lieu*, and without any reason being given. You would also be free to relinquish your appointment by giving one month's notice or one month's salary in lieu plus cost of living allowance. During the rest of your period of appointment, the appropriate notice required for both parties would be three months or one month's salary *in lieu* plus cost of living allowance.
>
> 3. The appointment offered is temporary.

The applicant in that case challenged the termination of his employment made pursuant to the said conditions. Raja Azlan Shah J (as HRH then was) in dismissing the application observed:

> Without deciding whether the applicant holds office during pleasure, I am clearly of the opinion that article 135(2) does not apply. The applicant was never dismissed from service. Dismissal pre-supposes some disciplinary proceeding against him whereby he is found guilty of indiscipline and misconduct under the Public Officers (Conduct and Discipline) Regulations 1956. This is not the present position here. This is purely a case of a contract being terminated under one of its clauses. To say that the applicant was dismissed would be to use that word in quite a different sense from any in which, as far as I can see, it has hitherto been used.

We are conscious of the fact that that case deals with appointment to public service, but we are of the view that the principle enunciated therein is equally applicable to the present case.

In *Quek Chek Yen v. Majlis Daerah Kulai* [1986] 1 LNS 103, the appellant was employed by the respondent, a local authority, as its secretary on a contract basis. Pursuant to the contract the respondent terminated his employment. He challenged the termination on the following grounds:

> (1) that the Chairman of the Local Council had no authority to terminate the appellant's service;
>
> (2) alternatively, the purported termination was without just cause or excuse and that no proper and fair procedure was followed;

(3) by implication, custom usage and practice the terms of service of the applicant were in parity with those of an officer in the public service and that one month's salary offered to him *in lieu* of notice was unreasonable and that he should have been given one year's notice.

In dismissing his claim the Supreme Court held, *inter alia*, that: (1) the relationship between the appellant and the Kulai Local Council in this case was solely contractual. In the absence of any other evidence the implied term of the contract was that the employment could be terminated by giving reasonable notice; (2) an employee is not entitled to question the motives of his employer if the employer has the right to dispense with his services at any time.

The other case which touches on the same issue is the case of *Calister Lionel v. The Government of Malaysia* [1983] 1 CLJ 99; [1983] CLJ (Rep) 479. In that case the respondent had been appointed in 1953 as a temporary clerk /interpreter in the Police Clerical Service. His appointment was on the terms that his engagement would be "terminable at one month's notice or on payment of one month's salary in lieu of notice on either side" and that in so far as they were relevant to the duties of his appointment and to his employment as a public servant, he would throughout such employment comply with the provisions of the General Orders applicable to his employment within the Federation. In 1962 disciplinary action was taken against him by the Chief Police Officer, Johore, under reg. 32 of the General Orders, Chapter D, for acts of alleged indiscipline. He was required to exculpate himself but his representations were not accepted and the Chief Police Officer informed him by letter that in effect he had failed to exculpate himself and that he had decided to terminate his services as a temporary clerk. The respondent appealed to the Public Services Commission for reconsideration of his case but his appeal was dismissed. In 1966 the respondent sought a declaration that his purported dismissal by the Chief Police Officer was void, inoperative and of no effect. The High Court dismissed the action but on appeal to the Federal Court, the appeal was allowed and a declaration as sought made (*Lionel v. Government of Malaysia* [1971] 1 LNS 67). The Government appealed to Yang DiPertuan Agong and the appeal was referred to the Privy Council. The appeal was allowed. It was held that under the laws of Malaysia a distinction is drawn between dismissal and termination of services and there is nothing in the Constitution which affects the right of the Government to terminate temporary employment in accordance with the terms of the engagement. The Privy Council further held that the trial judge was right in holding that the respondent had not been dismissed but that his services were validly terminated in accordance with the terms of his appointment. (*Government of Malaysia v. Lionel* [1973] 1 LNS 37).

It is to be noted that in that case the respondent was already charged with several breaches of discipline. He sent an exculpatory letter to the disciplinary authority and he received a reply from the Chief Police Officer stating that he had decided that he failed to exculpate himself but he decided that the services of the respondent be terminated on payment of one month's salary plus cost of living allowance *in lieu* of notice. Viscount Dilhorne in delivering the advice of the Board said:

> After the respondent had failed to exculpate himself, it was not obligatory to impose a punishment or penalty or to dismiss the respondent. His employment was terminable by one month's salary *in lieu* of notice and the decision to take that course may well have been due, as Syed Othman J said, to a desire to save the respondent from the ignominy of dismissal. If he had been dismissed it would have been a breach of reg. 48 for him to have been paid one month's wages plus cost of living allowance.

Following the authorities cited above we hold that the fact that some allegations of misconduct were made against the appellant would not bar the respondent from terminating the services of the appellant pursuant to the terms of employment. If as contended by learned counsel for the appellant the only way the respondent could act against the appellant is by way of disciplinary action then it would be placing the appellant in a better position than another employee who had been engaged on similar terms but had not committed any breach of discipline. In the latter case his services could be terminated by giving three months notice or in lieu thereof one month's salary but not in the case of the appellant. It would mean that the only way to get rid of the appellant is by way of disciplinary action. We are unable to accept that. In the circumstances of this case we would have thought that by terminating her services, it saves the appellant from the ignominy of dismissal. The appellant has no basis to complain. That answers the first and main point raised in this appeal.

Secondly it was contended on her behalf that the termination was in breach of her legitimate expectation that she could continue in her employment for the said period. In law for legitimate expectation to arise there must be evidence of a promise or undertaking made by the respondent to that effect. We find no such evidence before the court. On that premise we find that her claim for breach of legitimate expectation is wholly unsustainable.

The final point raised herein is that the notice was defective because nowhere in the contract is it stated that her services could be terminated on a 24 hour notice. By giving her such a notice the respondent had acted in breach of the contract. It is true that the contract contains no such provision. However, the contract does provide for three months notice of termination or *in lieu* of such

notice the appellant be paid one month's salary. The appellant was paid one month's salary, therefore, she may be given such shorter notice than the three months as stipulated in the contract. A 24 hour notice, in our view, would suffice.

For the above reasons, we found the appeal to be devoid of any merit and we accordingly dismissed it with costs.